TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 533

DUPARQUET HUOT & MONEUSE CO., E. E. ALLEY CO., INC., AND H. B. DAY CO., INC., PETITIONERS,

vs.

FRYSINGER EVANS, DU-WEL CLEANING CONTRACTING CO., GREENLEIGH PRINTING CO., INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 22, 1935.

CERTIORARI GRANTED NOVEMBER 25, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 533

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 16, 1935.

—7237-C

[fols. a & 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of 2168 Broadway Corporation, a Debtor Corporation

In Proceedings for the Reorganization of a Corporation Under Section 77B of the Bankruptcy Act

Creditors' Petition

To the Honorable the Judges of the United States District Court, for the Southern District of New York:

The petition of Duparquet Huot & Moneuse Co., a New York corporation, having its principal office and place of business at No. 108 West 22nd Street, in the Borough of Manhattan, City, County and State of New York, of E. E. Alley Co., Inc., a New York corporation, having its principal office and place of business at No. 39 White Street, in the Borough of Manhattan, City, County and State of New York, and of H. B. Day Co., Inc., a New York corporation, having its principal office and place of business at No. 604 West 48th Street, in the Borough of Manhattan, City, County and State of New York (hereinafter referred to as the "petitioners"), respectfully shows and alleges, upon information and belief:

1. The above-named debtor, 2168 Broadway Corporation (hereinafter referred to as the "debtor"), is a corporation organized on or about November 15, 1933, under and pursuant to the laws of the State of New York, having its principal place of business in the Borough of Manhattan, [fol. 2] City, County and State of New York, and as such is within the territorial jurisdiction of this Court.

2. Said debtor is a corporation which could become a bankrupt under §4 of the Act of Congress entitled, "An Act to establish a uniform system of bankruptcy throughout the United States" approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (hereinafter referred to as the "Bankruptcy Act"); and is a

corporation which might file a petition under §77B of said Bankruptcy Act.

3. Said debtor is engaged in the holding of real estate and is not a municipal, insurance, banking, or building and loan corporation, or a railroad corporation authorized to file a petition or answer under the provisions of §77 of said Bankruptcy Act; and the present operations of said debtor do not exclude it under the provisions of §77B of said Bankruptcy Act. Said debtor is neither a wage earner nor a person engaged principally in farming or tillage of the soil.

4. The petitioners are creditors of the debtor, are three in number, and have provable claims against said debtor, which amount in the aggregate, in excess of the value of securities held by them, if any, to One Thousand Dollars ($1,000) or over.

5. The nature, computation and amount of the claim of your petitioner Duparquet Huot & Moneuse Co., are as follows: $150.00 representing balance due and owing on [fol. 3] account of goods, wares and merchandise sold and delivered by this petitioner to debtor at debtor's request and upon its promise to pay therefor from January 1, 1933, to December 31, 1933.

6. The securities, if any, held for said claims by your petitioner Duparquet Huot & Moneuse Co., are as follows: None.

7. The nature, computation and amount of the claim of your petitioner E. E. Alley Co., Inc., are as follows: $680.10 representing balance due and owing on account of goods, wares and merchandise sold and delivered by this petitioner to debtor at debtor's request and upon its promise to pay therefor between November 2, 1934, and November 27, 1934, both dates inclusive.

8. The securities, if any, held for said claims by your petitioner E. E. Alley Co., Inc., are as follows: None.

9. The nature, computation and amount of the claim of your petitioner H. B. Day Co., Inc., are as follows: $325.30, representing balance due and owing on account of goods, wares and merchandise sold and delivered by this petitioner to debtor at debtor's request and upon its promise

to pay therefor between November 1, 1934, and December 31, 1934, both dates inclusive.

10. The securities, if any, held for said claims by your petitioner H. B. Day Co., Inc., are as follows: None.

11. The debtor has not filed in this or in any other Court a petition or answer under §77B of said Bankruptcy Act, [fol. 4] and this Court is one in which said debtor corporation might file such petition.

12. The debtor is unable to meet its debts as they mature.

13. The debtor during the six months preceding the filing of this petition, has had its principal place of business at 2166-2168 Broadway, in the Borough of Manhattan, City, County and State of New York, which is within the territorial jurisdiction of this Court.

14. The said debtor has committed an act of bankruptcy within four months hereof, as follows:

Heretofore and on or about October 15, 1934, by the service of a summons and complaint and the filing of a lis pendens, an action was commenced in the Supreme Court of the State of New York, County of New York, by Gertrude C. Buttenweiser against the debtor, to foreclose a mortgage in the principal sum of $42,500 held by the said Buttenweiser on the property of the said debtor. The complaint in said action alleged the debtor's default in payment of interest on said mortgage, which said mortgage matured on September 19, 1934. Thereafter and on or about December 19, 1934, by order of said Supreme Court receivers of the said property of the said debtor were appointed in said action. Said receivers entered into possession of and now hold the said property and are receiving and administering the income therefrom for the benefit of the said plaintiff in said action. Said receivership is now in full force [fol. 5] and effect and has not been revoked or terminated.

15. The petitioners as such creditors aforesaid of the debtor, propose that the debtor shall effect a reorganizaiton under and pursuant to §77B of the Bankruptcy Act.

16. Annexed hereto and marked Exhibit A is a brief description of the assets, liabilities and financial condition of the said debtor, to petitioners' best information and belief. Petitioners believe that said debtor has liabilities

in excess of those set forth in said schedule, but are without information or knowledge with respect thereto.

17. The capital stock of the said debtor consists of 16,500 shares of the par value of One Dollar each ($1.00), all of which are issued and outstanding.

18. A brief description of the financial condition of the debtor is as set forth in the aforesaid statement, Exhibit A, hereto annexed, and, so far as known to your petitioners, is in further detail as follows:

The debtor is unable to meet its matured and maturing obligations. It has defaulted in the payment of interest and principal upon a mortgage in the amount of $42,500, which matured on September 19, 1934. The total value of its assets taken at values reflected by current market conditions, exceeds the total amount of its liabilities, but said value cannot be immediately realized without great sacri- [fol. 6] fice. Its only property is being administered by receivers in the foreclosure action hereinbefore mentioned. Other creditors of the corporation are pressing for payment of their respective claims. The debtor is in arrears in New York municipal taxes approximating $260,000.

19. The facts showing the need for relief under §77B of the Bankruptcy Act are all of the facts hereinbefore alleged, and in addition thereto the following:

(a) The assets of said debtor are of great value. Under present market and financial conditions, however, any sale thereof, particularly immediate or forced, would result in great diminution in value and cause unnecessary and excessively great losses to lienors, creditors and others having interests in or claims against the same, especially in view of the improbability of obtaining presently or in the near future, any bona fide purchasers with sufficient means, ready, able and willing to purchase the whole or a substantial part thereof at a fair and reasonable price.

(b) The said debtor maintains and operates as a hotel the building on said premises, which is known as Manhattan Towers. Its business as now existing and conducted is in serious danger of great deterioration and loss, by virtue of the pending foreclosure action and pressure of other creditors. If a plan of reorganization can be effected it will result in a great saving of the assets of the debtor which

will redound to the benefit of the creditors and stockholders [fol. 7] of the debtor. Petitioners verily believe that if the debtor's assets are safely conserved and managed, they will ultimately be sufficient to satisfy in full all creditors of the debtor.

(c) It is essential for the protection of the interests of the stockholders and of all creditors that the forced liquidation of the debtor's assets should be avoided, and all creditors be restrained from prosecuting their claims except in these proceedings. Such liquidation will be accomplished if said foreclosure action should result in a sale pursuant to the judgment to be obtained in the said action. The property if sold at this time would bring but little to the estate because of the present depression in the real estate market. The said property of the said debtor formerly secured a mortgage in the amount of $1,650,000 and the assessed valuation exceeds $1,500,000. A forced sale at this time would net but a small fraction of its actual value.

20. The said debtor is a subsidiary of, and all the stock thereof is held by or for Commonwealth Bond Corporation, as to which corporation a petition under §77B of the Bankruptcy Act is now pending in this Court. Harvey T. Mann, Esq., was appointed Trustee for the said Commonwealth Bond Corporation by order of this Court on January 11, 1935, and has qualified and is now acting as such Trustee.

21. This petition is filed in good faith, and is neither collusive nor for the purpose of obtaining any preference or improper advantage for any one creditor or other party [fol. 8] in interest over any other creditor or other party in interest, or for any class of parties in interest over any other class of parties in interest, save as such classes are lawfully entitled to such preferences, if any, by virtue of their liens or securities.

22. Except as hereinabove set forth, no prior proceeding is pending in this or any other United States District Court for the relief herein sought, or for any part thereof; and no prior application has ever been made to this or to any other such court for the relief herein petitioned.

Wherefore, your petitioners pray:

1. That service of this petition with a subpœna may be made upon 2168 Broadway Corporation, the debtor, or any

of its officers, as provided by the Acts of Congress relating to bankruptcy.

2. That this Honorable Court approve this petition and that proceedings be had in accordance with the provisions of § 77B of the Bankruptcy Act.

3. That this Honorable Court, or a Judge thereof, appoint a trustee, or trustees, of the debtor's estate, with all rights, powers, privileges, duties and immunities that a trustee may have under said sections of the Bankruptcy Act.

4. That this Honorable Court, or a Judge thereof, shall direct the debtor corporation and/or such trustee, or trustees, to file such schedules and submit such other informa-
[fol. 9] tion as may be necessary to disclose the conduct of the debtor's affairs and the fairness of any proposed plan.

5. That this Honorable Court, or a Judge thereof, shall make order staying, until after final decree, any suit against the debtor upon a claim from which a discharge would be a release, and enjoin, and/or stay, the commencement or continuation of suits against the debtor until after final decree; and, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate of the debtor or any part thereof until after final decree.

6. That your petitioners be permitted to submit one or more plans and suggestions for the reorganization of the debtor, including any disposition to be made of its assets and properties, pursuant to § 77B of said Bankruptcy Act.

7. That your petitioners may have such other, further and different relief as to the Court may seem just, lawful and proper.

Dated, New York, January 30, 1935.

Duparquet Huot & Moneuse Co., by Edward A. Griffiths, Treasurer. (Seal.) E. E. Alley Co., Inc., by C. E. Morrison, Treasurer. (Seal.) H. B. Day Co., Inc., by Thomas F. Egan, Treasurer, (Seal). Petitioners.

[fols. 10 & 11] *Duly sworn to by Edward A. Griffiths et al. Jurats omitted in printing.*

[fol. 12] SCHEDULE 'A TO CREDITORS' PETITION

Assets:

Real Estate and building with furniture and fixtures located thereon, situate at the corner of Broadway and 74th Street, and described as No. 2166-2168 Broadway, in the Borough of Manhattan, City of New York, the value of which property, upon information and belief, is in excess of	$1,500,000.00

Liabilities:

Arrears for taxes	$260,000.00	
Mortgage indebtedness, exclusive of interest	42,500.00	
Creditors claiming to hold security (approximately)	86,509.73	
Accounts payable: Unsecured (approximately)	3,375.31	
Total		$392,385.04

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS—February 7, 1935

SIRS:

Please Take Notice, that Frysinger Evans, a creditor as defined and within the meaning of Section 77B of the National Bankruptcy Act as amended, of the above named Debtor, and having a claim against the Debtor within the meaning of the said Act, will make application before the Hon. John C. Knox, United States District Judge for the Southern District of New York, and who has assumed jurisdiction in the above entitled proceeding, at a hearing to be held by him in said proceeding on the 7th day of February, 1935, at 4 o'clock in the afternoon of said day, at the Chambers of the said Hon. John C. Knox, Woolworth Building, Borough of Manhattan, City, County and State of New York, for an order dismissing the petition filed herein by

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., on the ground that the said petition does not state facts sufficient to constitute a cause of action, and does not set forth the jurisdictional requirements of Section 77B of the National Bankruptcy Act as amended, in the following particulars:

[fol. 14] 1. The aforesaid alleged creditors named in said petition as creditors of the Debtor are not in fact creditors of the Debtor.

2. That said petition does not set forth an act of bankruptcy within the meaning of Section 77B (a) of the National Bankruptcy Act, as amended.

3. That the said petition was not filed in good faith within the meaning of Section 77B (a) (b) of the National Bankruptcy Act, as amended.

4. That the Court has no jurisdiction of the Debtor or over its property.

Or, in the alternative, in the event that the Court shall deny the relief sought by the undersigned, for leave to file an answer to the petition herein within ten days after said decision of the Court and notice thereof, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., February 7th, 1935.

Yours, etc., Daniel A. Shirk, Attorney For Frysinger Evans, Appearing Specially for this Motion, Office & P. O. Address, 170 Broadway, Borough of Manhattan, New York City.

To Harper & Matthews, Esqs., Attorneys for Petitioning Creditors, 70 Pine Street, Borough of Manhattan, New York City.

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS—April 6, 1935

SIRS:

Please Take Notice, that the undersigned, on behalf of the three creditors of the above named alleged debtor,

within the meaning of Section 77B of the National Bankruptcy Act as amended, and upon whose behalf he filed an answer herein with the said Honorable John C. Knox, a copy of which answer has heretofore been served upon you, will make application before the Hon. John C. Knox, United States District Judge for the Southern District of New York, the Judge in charge of the above-entitled matter, at a hearing to be held by him in connection therewith on the 11th day of April, 1935, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as Counsel can be heard, at Room 401 of the Old Post Office Building, Park Row, Borough of Manhattan, New York City, for an order dismissing the petition filed herein by Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., on the ground that the said petition does not state facts sufficient to constitute a cause of action, and does not set forth the jurisdictional requirements of Section 77B of the National Bankruptcy Act as amended, in the following particulars:

[fol. 16] 1. The aforesaid alleged creditors, or one or more of them named in said petition as creditors of the Debtor are not in fact creditors of the Debtor.

2. That said petition does not set forth an act of bankruptcy within the meaning of Section 77B (a) of the National Bankruptcy Act, as amended.

3. That the said petition was not filed in good faith within the meaning of Section 77B (a) (b) of the National Bankruptcy Act, as amended.

4. That the Court has no jurisdiction of the debtor or over its property.

Dated, New York, N. Y., April 6th, 1935.

Yours, etc., Milton A. Goldiner, Attorney for Creditors, Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc., Gramercy Quality Laundry Co., Inc., Office & P. O. Address, 170 Broadway, Borough of Manhattan, City of New York.

To Harper & Matthews, Esqs., Attorneys for Petitioning Creditors, 70 Pine Street, New York City. J. Harlan O'Connell, Esq., Attorney for Alleged Debtor, 61 Broadway, New York City.

[fol. 17] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

#61346

In the Matter of 2168 BROADWAY CORPORATION, Alleged Debtor

MEMORANDUM, KNOX, D. J.—May, 1935

KNOX, D. J.:

A receivership that is merely incidental to the foreclosure of a mortgage upon real estate of a corporate debtor that is unable to meet its debts as they mature, is not of the quality of the "equity receivership," which, under the provisions of sub-division (a) of Section 77B of the bankruptcy statute, and in the absence of an act of bankruptcy, will confer upon creditors of such debtor a right to subject it and its property to the jurisdiction of this court. See In the Matter of Laclede Gas Light Company, United States District Court, Eastern District of Missouri, June 26, 1934; Standard Accident Insurance Company v. E. T. Sheftall & Company, 53 F. (2d) 40; and Schmidtman v. Atlantic Phosphate & Oil Corporation, 230 F. 769, 771.

In my opinion, the "equity receivership" contemplated by Section 77B is of much wider scope than that which frequently accompanies foreclosure proceedings; for ex-[fol. 18] ample, a general receivership, or one such as characterized the socalled "conservation suits" with which all of us are familiar. These suits usually resulted in the reorganization of a corporate debtor, or the pro rata distribution of its assets among its creditors. I am aware, of course, that the United States District Court for the Eastern District of Illinois in the matter of Flamingo Hotel Company, decided August 9, 1934, and in the case of Surf Building Corporation, decided October 13, 1934, entertains a contrary view. But, I cannot agree therewith. Adjudications dealing with Section 3(a) sub-division 5 of the Bankruptcy Act, and which long antedate the enactment of 77B, hold that an appointment of a receiver or trustee of the property of an alleged bankrupt, in order to constitute an act of bankruptcy, relates to such an appointment in the course of a general receivership, and not to one for

specifically described property and which occurs in the progress of the ordinary foreclosure action. I see no occasion to infer that Congress, in enacting 77B, intended that a foreclosure receivership of a specific piece of real estate, even though it may constitute the debtor's only asset, should be comprehended by the words, "equity receivership" as they are used in the statute under consideration. Had the national legislature wished to include foreclosure receiverships within the descriptive words it saw fit to employ, I think the language would have been more explicit. In construing the words "equity receivership" as employed in 77B, it is necessary to take note of the fact that apparently they are used in apposition to the phrase "a prior proceeding in bankruptcy," which proceeding of course, looks for- [fol. 19] ward to the ratable distribution of a bankrupt's assets among its creditors. Such is not the necessary or usual objective of a foreclosure receivership. Its primary purpose is to protect a mortgagee whilst he completes the formalities of the foreclosure of his lien. The mortgagor's unsecured creditors can not participate either in the mortgaged security, or in its avails, until the lien holder is fully satisfied. Equity receiverships, on the other hand, as customarily administered in the Federal courts, took on many of the habiliments of bankruptcy proceedings. Often they were a substitute, if not a subterfuge, for bankruptcies, and, in one form or another, finally wound up the affairs of the defendant corporation. Hence, I conclude that the foreclosure receivership on which petitioners rely, is not sufficient to enable the alleged debtor to be subjected to the provisions of 77B of the Bankruptcy Act, and the petition to that end will be dismissed.

With respect to petitioners' argument that the answer herein supplies any deficiency that may exist in the petition, it is necessary only to say that the attorney filing the answer has indicated his wish to withdraw the same, and further that it, too, is under attack by an alleged officer and director of the debtor. Under these circumstances, I think too much reliance should not be placed thereon.

May 8th, 1935.

Jno. C. Knox, U. S. D. J.

[fol. 20] IN UNITED STATES DISTRICT COURT

#61,346—In Bankruptcy

In the Matter of 2168 BROADWAY CORPORATION, Alleged Debtor

In a Proceeding for a Corporate Reorganization Under Section 77B of the Bankruptcy Act

ORDER DISMISSING PETITION—May 13, 1935

Three alleged creditors of the above-named alleged debtor having duly filed with the Clerk of this Court a petition, pursuant to Section 77B of the Bankruptcy Act, in a proceeding for a corporate reorganization on February 1st, 1935, and thereafter Frysinger Evans, creditor of the above-named alleged debtor, having duly served and filed notice of motion to dismiss the said petition, on the ground that on its face the said petition does not set forth sufficient facts to comply with the jurisdictional requirements of Section 77B of the National Bankruptcy Act as amended, and is therefore insufficient in law, and thereafter three alleged creditors of the above-named alleged debtor, to-wit: Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc. and Gramercy Quality Laundry Co., Inc., by their attorney, [fol. 21] Milton A. Goldiner, Esq., having duly served and filed notice of motion to dismiss the aforesaid petition on the ground that said petition does not set forth the jurisdictional requirements under Section 77B of the National Bankruptcy Act as amended, and is therefore insufficient in law,

Now on reading the petition of Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., dated January 30th, 1935, verified January 31st, 1935 and February 1st, 1935, together with Schedule "A" thereto annexed and made part thereof, and filed with the Clerk of this Court on February 1st, 1935, and on reading and filing the notice of motion dated February 7th, 1935, wherein Frysinger Evans appears by Daniel A. Shirk, his attorney, specially for the purposes of said motion, the notice of motion dated April 6th, 1935, served on behalf of Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc. and Gramercy Quality Laundry Co., Inc., three creditors of the

alleged debtor who appeared by Milton A. Goldiner, Esq., their attorney (Daniel A. Shirk, Esq., of Counsel), all read in support of said motion, and argument of said motion having been had on April 18th, 1935, and after hearing Daniel A. Shirk, as attorney for Frysinger Evans, appearing specially and as counsel on behalf of Milton A. Goldiner, Esq., attorney appearing generally for three creditors, as aforesaid, in support of said motion to dismiss, and Harper & Matthews, Esqs. (Mr. Harold Harper, of Counsel) attorneys for the petitioning creditors in opposition thereto; and on due deliberation, it is,

[fol. 22] On motion of Daniel A. Shirk, appearing specially as attorney for Frysinger Evans and on motion of Milton A. Goldiner, appearing generally on behalf of three creditors of the alleged debtor,

Ordered, that said motion to dismiss the petition herein be and the same hereby is in all respects granted.

John C. Knox, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

An order having been entered herein on or about the 14th day of May, 1935, in the United States District Court for the Southern District of New York, granting the motion of Frysinger Evans, Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc. and Gramercy Quality Laundry Co., Inc., to dismiss the petition of Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., heretofore filed herein, for the reorganization of 2168 Broadway Corporation, a New York Corporation, in accordance with § 77B of the National Bankruptcy Act as amended,

[fol. 23] And Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., the petitioning creditors, conceiving themselves aggrieved by said order, do hereby pray that an appeal be allowed to them from said order to the United States Circuit Court of Appeals for the Second Circuit, and in connection with this petition do

hereby present their assignments of error, and further pray that a proper transcript of the record of proceedings and papers upon which said order was made, duly authenticated, be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Dated, New York, May 22, 1935.

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., H. B. Day Co., Inc., Petitioning Creditors, by Harper & Matthews, Attorneys for Petitioning Creditors, Office & P. O. Address, No. 70 Pine Street, Borough of Manhattan, City of New York.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

The above appeal is allowed upon filing a bond for the costs in the sum of Two Hundred Fifty Dollars ($250).

Dated, New York, May 25th, 1935.

Jno. C. Knox, U. S. D. J.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., hereby file the following assignments of error upon their appeal from the order of the United States District Court for the Southern District of New York, entered herein on May 14, 1935, granting in all respects the motion of Frysinger Evans, appearing specially herein, and of Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc. and Gramercy Quality Laundry Co., Inc., three creditors of the alleged debtor appearing generally herein, to dismiss the petition (hereinafter called "the petition"), of Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc. and H. B. Day Co., Inc., in a proceeding for a reorganization of 2168 Broadway Corporation pursuant to § 77B of the Bankruptcy Act, viz.:

1. That the said District Court erred in dismissing the petition.

2. That the said District Court erred in granting the said motion to dismiss on the ground that the petition did not comply with the provisions of § 77B of the Bankruptcy Act as amended and was insufficient in law.

[fol. 25] 3. That the said District Court erred in holding that the petition failed to allege that a prior proceeding in equity receivership was pending within the meaning of § 77B of the Bankruptcy Act.

4. That the said District Court erred in holding that it was necessary that the petition allege that a prior proceeding in equity receivership was pending against the alleged debtor or that the alleged debtor had committed an act of bankruptcy within four months in a case where the petition alleged that a receiver of all of the property of the corporation had been appointed by a State Court.

5. That the aforesaid order granting the said motion is contrary to law.

6. That the said District Court erred in making the whole of said order and each and every part thereof.

Dated, New York, May 22, 1935.

Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., H. B. Day Co., Inc., Petitioning Creditors, by Harper & Matthews, Attorneys for Petitioning Creditors, Office & P. O. Address, No. 70 Pine Street, Borough of Manhattan, City of New York.

[fol. 26] Citation, in usual form, omitted in printing.

[fol. 27] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER OF UNITED STATES CIRCUIT COURT OF APPEALS ALLOWING APPEAL—June 6, 1935

A motion having been made herein by counsel for the appellants for leave to appeal from a certain order of the District Court entered May 14, 1935;

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, June —, 1935.

Harper & Matthews, Attorneys for Appellants.
Daniel A. Shirk, Attorney for Frysinger Evans.
Milton A. Goldiner, Attorney for Creditors.

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 30] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

October Term, 1934

No. 494

Argued June 19, 1935. Decided July 15, 1935

In the Matter of 2168 BROADWAY CORPORATION, Alleged Debtor,

DUPARQUET, HUOT & MONEUSE Co., E. E. ALLEY Co., and H. B. DAY Co., INC., Appellants

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, Swan, and Augustus N. Hand, Circuit Judges

Three creditors of 2168 Broadway Corporation filed a petition under Section 77B of the Bankruptcy Act (11 U. S. C. A., § 207), alleging that receivers had been appointed in a mortgage foreclosure action brought against the said corporation. From an order granting the motion of other creditors to dismiss the petition as insufficient on its face, the petitioners have appealed. Order affirmed.

Harper & Matthews, of New York City (Mark M. Horblit, of Boston, Mass., and Harold Harper, of New York City, of counsel), for appellant.

Daniel A. Shirk and Milton A. Goldiner, both of New York City (Edwin R. Wolff and Daniel A. Shirk, both of New York City, of counsel), for appellees.

SWAN, Circuit Judge:

It is provided by Section 77B (a), Bankr. Act, 11 U. S. C. A., § 207 (a), that three or more creditors, who have provable claims against a corporation aggregating $1,000 or more in excess of the value of securities, may file "a petition stating that such corporation is insolvent or unable to meet its debts as they mature and, if a prior proceeding in bankruptcy or equity receivership is not pending, that it has committed an act of bankruptcy within four months,"

and that such creditors propose that it shall effect a reorganization. Subdivision (i), § 77B of the Act, 11 U. S. C. A., § 207 (i), further provides: "If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court * * * a petition or answer may be filed under this sectioin at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section." The appellants are three creditors of 2168 Broadway Corporation, a New York corporation which holds the title to premises known as 2166-2168 Broadway. They filed a petition for the reorganization of their debtor, alleging that receivers had been appointed in an action commenced in the state court to foreclose a mortgage upon the debtor's property and that such receivers were in possession of its only property and administering the income therefrom for the benefit of the plaintiff in said action. Upon motion of other creditors of the debtor corporation the District Court dismissed the petition on the ground that a mortgage foreclosure suit, in which receivers have been appointed, is not an "equity receivership" within the meaning of Section 77B. The correctness of this construction is the sole question presented.

Because the statute is of so recent enactment there has been as yet but little expression of judicial opinion on this [fol. 31] important question. In three cases arising in the Eastern District of Illinois, Judge Lindley has held a mortgage foreclosure suit in which receivers were appointed to be an "equity receivership" for the purposes of Section 77B. In re Flamingo Hotel Co. (August 9, 1934, not reported [1]); In re Surf Building Corp., (Oct. 17, 1934) — F. Supp. —; In re Granada Hotel Corp., (D. C.) 9 F. Supp. 909. The case last cited has been affirmed by the Circuit Court of Appeals for the Seventh Circuit in a short per curiam opinion, handed down June 5, 1935, — F. (2d) —. Opposed to these decisions is the opinion of Judge Knox in the case at bar, a decision by Judge Hulbert in In re Draco Realty Corp., (D. C. S. D. N. Y., June 3, 1935), and a dictum by Judge Faris in In re Laclede Gas Light Co. (D. C. S. D. Mo., June 26, 1934, not reported [1]). See, also, 48 Harv. L. Rev. 39, 54, note 57.

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[1] Oral and not for publication.

[1] Oral and not for publication.

The appellants argue that the words "equity receivership" are too clear to admit of construction and that custody of the property of a corporation by a receiver appointed in the exercise of chancery powers in any suit in equity must necessarily satisfy the requirements of the statute. It cannot be gainsaid that an action to foreclose a mortgage is a suit in equity, or that the receiver appointed in such a suit to conserve the mortgaged property and collect the rents pending foreclosure may properly be called a receiver in equity. See Carmody's N. Y. Practice (2d Ed), Vol. 8, § 1023; Gordon v. Washington, 294 U. S. —, 55 S. Ct. 584, 79 L. Ed. — (April 1, 1935). Nevertheless, it by no means follows that that is the type of suit Congress had in mind when it used the words in question. It would be strange indeed to call such a suit an "equity receivership"; so far as we are aware, a foreclosure action is never so referred to. The kind of suit to which those words are usually applied in common parlance is one commenced by a simple contract creditor praying for the conservation of the assets of a corporation insolvent in the common-law sense, in which the corporation confesses the allegations of the bill and consents to the appointment of a receiver. The end sought by such a suit is the liquidation of the assets and their equitable distribution among creditors (Gordon v. Washington, supra), although in rare instances successful administration in receivership may restore to the corporation the ability to meet its debts in due course and the right to repossess its assets. The hope of saving the business is the impelling motive for such an equity receivership, as is indicated by the name "conservation suit," by which it is sometimes called. In our opinion it was a receivership of this general type, initiated by suit by a general creditor or a stockholder of the corporation, which Congress had in mind. Compare Bryan v. Welch, 74 F. (2d) 964 (C. C. A. 10). We do not think it was intended that the appointment of a receiver in foreclosure who takes possession of a specific piece of property for the sole benefit of the lienholder should serve as the basis for involuntary reorganization proceedings.

It is urged that this kind of equity receivership originated in the eastern part of the country and has not been used generally throughout the nation, except as to railroad corporations; that to construe the words as we have indicated is to ascribe to them a colloquial meaning contrary to well-

recognized canons of statutory construction. But the debates in Congress during the progress of the bill, although not affording any conclusive evidence of the meaning of the words in question, indicate that the legislators were thoroughly familiar with this type of receivership. See 78 Cong. Rec. 7890, 7905-7907. Moreover, the words are used in apposition to "a prior proceeding in bankruptcy." If either a proceeding in bankruptcy or an equity receivership is pending, it is unnecessary to allege that the corporation has committed an act of bankruptcy within four months. The appointment of a receiver in foreclosure proceedings is not an act of bankruptcy. See Standard Accident Ins. Co. v. E. T. Sheftall & Co., 53 F. (2d) 40, 41 (C. C. A. 4). The canon of ejusdem generis is applicable. Bankruptcy looks to a liquidation of assets and an equitable distribution among creditors. So also does an equity receivership in a "conservation suit." When Congress enacted Section 77B, a distressingly large number of corporations had already been, or were in danger of being, placed in bankruptcy or equity receivership of the type described. It was seen that immediate liquidation of the assets would result in [fol. 32] economic waste and unnecessary loss to creditors and stockholders. The purpose of the legislation was to supersede proceedings looking to liquidation by proceedings looking to reorganization if there was an honest prospect that a plan fair to all interests could be devised to save the business. The benefits of the plan could be sought voluntarily by the debtor corporation, or they could be obtained upon an involuntary petition filed by creditors under the conditions specified. Reading the language in the setting in which it is used and in the light of the purpose of the legislation, we cannot think that Congress intended to give three creditors having claims totaling as little at $1,000, the right to force a corporation into a reorganization, if a receiver were appointed in the foreclosure of a mortgage covering any of its property. Situations may well be imagined in which a corporation might allow a mortgage on part of its land or on a chattel to be foreclosed, with the appointment of a receiver pending foreclosure, without being in any need of a reorganization. We do not believe that it was the purpose of Congress to permit every foreclosure proceeding in which a receiver might be appointed to be superseded by an involuntary reorganization. In the case at bar the mortgage covered all

the debtor's property, but the logic of the appellants' position, as they concede, compels them to argue for the same results however small a portion of the debtor's property may be involved in foreclosure. Subdivision (i), it is true, refers to the appointment of all or any part of the property of a corporation. This, we think, contemplates a situation where the corporation may have property outside the jurisdiction of the appointing court, in which case only part of its property could be in equity receivership without ancillary proceedings. In our opinion the District Court correctly construed the statute.

Accordingly the order is affirmed.

[fol. 33] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 22nd day of July, one thousand nine hundred and thirty-five.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

In the Matter of 2168 BROADWAY CORPORATION, Alleged Debtor, Duparquet, Huot & Moneuse Co., et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 34] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re 2168 Broadway Corporation. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 22, 1935. William Parkin, Clerk.

[fol. 35] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 34, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of In the Matter of 2168 Broadway Corporation, Alleged Debtor—Duparquet, Huot & Moneuse Co. et al., Appellants, as the same remain of record and on file in my office.

In Testimony Whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of October, in the year of our Lord one thousand nine hundred and thirty-five, and of the Independence of the said United States the one hundred and sixtieth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 36] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 25, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 428.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,087. U. S. Circuit Court of Appeals, Second Circuit. Term No. 533. Duparquet Huot & Moneuse Co., E. E. Alley Co., Inc., and H. B. Day Co., Inc., petitioners, vs. Frysinger Evans, Du-Wel Cleaning Contracting Co., Greenleigh Printing Co., Inc., et al. Petition for a writ of certiorari and exhibit thereto. Filed October 22, 1935. Term No. 533, O. T., 1935.

(7237-C)